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No. 177.

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In the Supreme Court

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United States.

OCTOBER TERM, 1899.

PATRICK MORAN,
Plaintiff in Error,

vs.

JOSEPH HORSKY, JR.,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

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BRIEF OF PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

This action was instituted in the District Court of Lewis and Clarke County, Montana, by the defendant in error against the plaintiff in error, to quiet the title of the former to Lots 17, 18, 19, 20 and 31 in Block

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37 of the townsite of Helena, County of Lewis and Clarke, Montana, and to nullify a deed issued by the probate judge of the said County of Lewis and Clarke to the plaintiff in error in the year 1888 for said Lot 31.

The amended complaint avers that in the year 1874 the defendant in error became the owner of said lots 17, 18, 19 and 20, in Block 37, and that he has possessed the same, as well as Lot 37, adversely since and until the commencement of the action, his title coming directly or through mesne conveyances from the probate judge of the said county, to whom a patent for certain tracts including the lots in question was issued June 15, 1872, pursuant to the laws of the United States concerning the reservation and sale of townsites on the public lands.

He further avers that these lots had in fact an aggregate frontage of one hundred sixty-one feet instead of one hundred thirty-seven feet as designated by the calls in the deeds and by the official plat.

In the year 1888, the probate judge issued to the defendant in error a deed for Lot 31 in Block 37, which said lot comprised the excess above mentioned—a new plat of the townsite having been made, upon which this lot appeared for the first time.

See first amended answer—

Transcript, Page 7, Folio 14.

The complaint further alleges that in the year 1873, one R. S. Hamilton, the grantor of the defendant in

error, recognizing that the lots as actually occupied and possessed by him had a greater frontage than his deeds called for, applied to the probate judge to purchase the excess as a separate lot, and paid the purchase price of the same, though it appears no deed was issued to him. Upon this showing he sought the relief indicated.

Transcript, Pages 8 to 11.

The answer, while admitting the adverse occupancy, denies that the defendant in error is the owner of any portion of the premises. He avers that on the 2nd day of March, 1869, the probate judge of Lewis and Clarke County, Montana, entered certain tracts of land as a townsite, pursuant to the laws of the United States; that at the time of the making of the said entry, the plaintiff in error was the owner of a placer mining claim within the exterior boundaries of the tracts so entered by the probate judge, which mining claim had theretofore been located pursuant to the laws of the United States and the local laws and customs of miners, and pursuant to the rules, regulations and laws of the mining district in which the same was situated; that the ground so located contained, at the time it was located and at the time of the entry by the probate judge, and still contains valuable deposits of gold; that from the time of its location until after the time of the entry of the probate judge it had been worked by the plaintiff in error and his predecessors in interest, who during all of said period were in the occupancy and possession of the same and were

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engaged in extracting the gold from the said claim, and that the said mining claim embraced within its exterior limits all the ground claimed by the defendant in error in his complaint. He accordingly avers *"that at the time of the said entry of the said townsite, he had a valid and subsisting mining claim to all the ground so located, embracing all of the premises claimed by the plaintiff in his complaint, which said ground was then a mine of gold, by reason whereof the title to the same remained in the United States subject to the right of the defendant herein to acquire a patent thereto agreeably to the laws of the United States."*

He further avers that having, after the entry of the townsite, left the State of Montana, leaving his mining claim in charge of an agent, the defendant in error without any attempt to acquire title to the same under any of the laws of the United States pursuant to which title might be acquired, entered upon so much of his mining claim as the said defendant in error claims in his complaint, which he continues to occupy and from which he excludes plaintiff in error; that other parties have in like manner intruded upon and occupy the remainder of his claim and exclude him from it; that these parties prevent him from going into possession for the purpose of resuming work upon his claim to preserve it from forfeiture and to enable him to obtain a patent to it; and that with a view to getting into possession for that purpose he

applied to the probate judge for and from him obtained the deed to Lot 31 referred to in the complaint.

He asks that the complaint be dismissed and that he be put into possession, and that the defendant in error be enjoined from interfering with his possession or with his doing such work as may be necessary to enable him to obtain a patent.

Transcript, Pages 11 to 14.

Upon this answer, a motion for judgment on the pleadings was made.

Transcript, Pages 14 and 15,

which was granted and judgment entered as prayed in the complaint.

Transcript, Page 15.

While the motion for judgment was under advisement, the defendant in error took leave to amend his complaint by averring the fact and date of the issuance of patent to the probate judge, and upon the court's ruling, the amendment was made. At the same time the court denied the application of the plaintiff in error to amend his answer by averring that all the deeds issued by the probate judge to the defendant in error and his predecessors and all other parties who appropriated the plaintiff in error's mining claim, contained the following provision, to wit: "*This conveyance is made subject to the bona fide rights of miners possessed of mining ground within*

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the limits above named (the premises granted by such deed) on the 26th day of February, 1869."

From the judgment entered in the District Court an appeal was taken to the Supreme Court of Montana.

Transcript, Page 33,

by which court the judgment was affirmed.

Transcript, Pages 36 to 38,

and the cause is brought here on a writ of error.

Transcript, Page 39.

II.

ASSIGNMENT OF ERROR.

The plaintiff in error assigns that it was error to grant the motion of defendant in error for judgment on the pleadings and to render judgment against him without a trial and that the Supreme Court of Montana erred in affirming such action.

The error assigned appears upon the face of the record.

III.

ARGUMENT.

The legal proposition presented by this record was adjudicated by this court in favor of the contention of the plaintiff in error in

Deffeback vs. Hawk, 115 U. S., 392.

Unless this court shall overrule that case the judgment herein must be reversed.

In that case this court held that a *patent* to a probate judge under the provisions of the laws of the United States for the Reservation and Sale of Townsites on the public domain is "*inoperative as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation or improvement for residences or business under the townsite title*"; and this by virtue of the express provisions of the law relating to the disposition of lands for townsites as follows:

> "No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws."
>
> R. S. U. S., 2392.

The mining claim of the plaintiff in error, held and worked by him at the time of the entry, was excepted from the patent to the probate judge for the townsite of Helena, just as effectually and in the same manner as though it were described therein by metes and bounds and specifically reserved from the grant. The probate judge got no title to it by virtue of his patent, and could, of course, give title to no one by his deed. The title to the ground embraced in the "valid mining claim" of the plaintiff in error, possessed and worked by him as a mine of gold at the time of the entry of the townsite, either still remains in him, or in the United States, if, by for-

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feiture or otherwise, he is unable now to assert his original right. The United States never patented it to the probate judge of Lewis and Clarke County nor to any one else.

The principle of the decision in Deffeback vs. Hawk has been repeatedly applied by the supreme court of Montana, before which tribunal, under both the territorial and the state government, it has become the settled law that every valid mining claim existing within the exterior limits of a townsite at the time of its entry is expressly expected from the operation of the townsite patent, and that it is not possible by such a patent to obtain any interest or title thereto.

Silver Bow M. & M. Co. vs. Clark, 5 Mont., 378;

Talbot vs. King, 6 Mont., 76;

Butte City Smoke House Lode Cases, 6 Mont., 397;

King vs. Thomas, 6 Mont,, 409.

These cases never came before this court for determination, but the conclusion reached in them was approved in the case of

Davis vs. Wiebold, 139 U. S., 507,

and the opinions written in them referred to as "very able and learned."

In the Montana cases above referred to, a patent had been issued to the probate judge for the townsite of Butte. Within the boundaries of the lands so granted there were at the time of the entry of the townsite, valid mining locations, among others the Smokehouse and the Pawnbroker lode claims. Notwithstanding the fact that the ground so covered by the said locations had been in terms conveyed by patent to the probate judge with other lands, the land department, on a showing that these mining claims had been located prior to the entry by the probate judge, issued to the owners patents for the same, and the actions above referred to were in the nature of ejectment brought by the mineral claimants or their grantees against the grantees of the probate judge to recover from the latter the possession of portions of the ground held by them within the limits of the mineral patent.

In view of the express and unusual approbation given by this court to the opinions filed in those cases, the plaintiff in error ventures to quote with some freedom from them.

The decision of the court was put upon two grounds:

(1) That the land was already granted to the miner when he located it as a mineral claim, and that the subsequent grant to the probate judge was so far void.

(2) That a valid mining claim existing at the time of the entry of the townsite was excepted out of the town-

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site patent, as if it were reserved by metes and bounds, and never was granted or attempted to be granted to the probate judge.

In elucidation and support of the first ground upon which the court rests its decision, the following language is quoted from

Steel vs. Smelting Co., 106 U. S., 450.

> "If the lands were never the property of the United States, or if no legislation authorized their sale, or if they had been previously disposed of or reserved from sale, the patent would be inoperative to pass the title, and objection to it could be taken on these grounds at any time, and in any form of action. In that respect, the patent would be like the deed of an individual, which would be inoperative if he never owned the property, or had previously conveyed it, or had dedicated it to uses which precluded its sale."

Smelting Co. vs. Kemp, 104 U. S., 644;

Patterson vs. Winn, 11 Wheat., 380;

U. S. vs. Tichener, 12 Fed. Rep., 415;

New Orleans vs. U. S., 10 Pet., 662;

Richards vs. Felps, 6 Wall., 160;

Best vs. Polk, 18 Wall., 112;

Stoddard vs. Chambers, 2 How., 284;

Polk's Lessee vs. Wendell, 9 Cranch, 99.

And thereto the court adds the following comment:

> "Before the patent for the townsite had issued, the Pawnbroker mining claim had been granted and sold, and thereby withdrawn and taken from the public lands, and the executive officers, therefore, had no authority to include in the townsite patent lands so disposed of, and if the townsite patent includes such lands, and the fee thereof, as appellants contend, it is so far and to that extent void."
>
> *Silver Bow M. & M. Co. vs. Clark*, 5 Mont. 421-422.

The views of the court concerning the second proposision supporting its conclusion in the cases referred to, may be gathered from the following extracts from the opinions:

In *Silver Bow vs. Clark*,

as follows:

> "If no title can be acquired to a mining claim or possession by virtue of the townsite act, then the defendant herein, who claims by virtue of a subsequent townsite entry and patent, cannot disturb the possession of the plaintiff, who claims by virtue of a prior valid location and patent of the mining claim in question."
>
> 5 Mont., 416;

and, in the same case, speaking of the claim that the mining claimants were estopped by the issuance of the townsite patent and that that was the time for them to be heard, the Court says:

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"Their mining claim was excluded from the operation of the townsite act. The law did not require any such action on their part, for they had no adverse claim."

5 Mont., 417.

The same idea is asserted in

Talbott vs. King,

as follows:

"The townsite patent takes hold of and conveys title to the lands within its limits, except the mines and mining claims and possessions therein, in trust for the occupants thereof, for town purposes, while the mining claim patent only affects the ground within which there has been a discovery and location according to law."

6 Mont., 102.

In the Smokehouse cases it is said to have been determined in the foregoing

"that it is impossible, under a patent to a townsite, to acquire any interest in any mine of gold, silver, cinnabar or copper, or in any valid mining claim or possession, held under existing laws; that, as to any such mining claim or possession, a patent to a townsite did not take hold of, operate upon, or in any manner affect it."

6 Mont., 400-401.

In the same case the Court says:

"The theory of appellants seems to be that the townsite patent conveys all the ground included within the boundaries of the townsite, regardless of prior conveyances to other parties; * * * that the words in the patent excluding from its operation all mines, mining claims and possession held under existing laws, was not an exception that excluded any lands from the Butte townsite."

6 Mont., 401.

Concerning this theory, the Court expresses itself as follows:

"Their patents do not cover or touch the same property. By the express terms of the law, and by the express terms of the townsite patent, all valid mines, mining claims and possessions held under existing laws were excluded from the operation of that patent. At the time of the issuance of the townsite patent in 1877, the Smokehouse location had, for more than two years, been a valid mining claim and possession. * * * The Smokehouse location, being a valid mining claim at the time, was expressly excepted from the operation of the townsite patent, and it was not possible by such a patent to have obtained any interest or title thereto. There is no conflict between a townsite patent and a mining claim patent, and can be none. They evidence separate and distinct grants, and cannot conflict with one another. The one conveys a mining claim, an independent grant, and the other conveys ground for a townsite, from which, by the law, all valid mining claims and possessions are excluded. Many valuable mines, mining claims and possessions are held and owned by perfect titles, over which townsites have been extended, and there can be no conflict between

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> them. The two titles take hold of and affect property that is entirely separate and distinct."
>
> 6 Mont., 402–403.

And in the same case, concerning language used by Justice Field, in Deffeback vs. Hawke, the Court says:

> "That is equivalent to saying what we have already said in this decision, that the townsite patent took hold of the non-mineral lands included within its limits, but did not touch or in any manner affect the mining claims therein; and hence that the patent to the Butte townsite did not affect the Smokehouse location; and, further, that there is not and cannot be any conflict between a townsite and a mining claim patent."
>
> 6 Mont., 408.

The learned district judge before whom this cause was first heard, recognized that if the doctrine of the Pawnbroker and Smokehouse cases stood, the motion for judgment on the pleadings must be denied. He seems to have entertained the view, however, that the supreme court of the state would be constrained by reason of the decisions of this court in

Davis vs. Wiebold, 139 U. S., 528, and

N. P. R. R. Co. vs. Barden, 154 U. S., 288,

to recede from the position taken in those cases.

Transcript, Page 31.

He ventured, accordingly, to consider the question as an open one, and wrote an able opinion, attacking the conclusion of the court so far as it was based upon the first ground referred to, but which, it must be said in fairness, left the second ground altogether untouched.

This opinion was incorporated in the one filed by the supreme court in affirming the judgment, and is found in the

Transcript, Pages 19 to 33.

Intervening the time, however, between the filing of this opinion in the district court and the hearing of the cause in the supreme court, after the state had been admitted, the supreme court of Montana reaffirmed the Smokehouse cases in

Chambers vs. Jones, 17 Mont., 156.

The opinion of the district court filed upon the motion for judgment,—briefly expressed—maintains that the patent to the probate judge granted to him all the ground within its limits,—that portion which was embraced within valid mining claims, as well as that which was occupied by townsite claimants and unoccupied portions confessedly non-mineral; that the mineral claimants were called upon to oppose before the land department the application for patent to the probate judge, and that the issuance of the patent was a conclusive adjudication that no such claims existed and that all the land within the grant was non-mineral, or, in any case, that the only

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relief the mineral claimant was entitled to was to maintain an action in equity within the period of the statute of limitations to have the probate judge decreed to hold that portion of his grant included within the mining claim as trustee for the mining claimant.

It will be observed that no one of these contentions was overlooked by the able counsel who argued the Smokehouse and Pawnbroker cases for the townsite claimants, chief among whom was the Hon. Hiram Knowles, since the admission of the state United States District Judge for Montana, nor by the court in the elaborate opinions filed in the early cases.

The view of the law taken in those cases was accepted not only by this court, but by all the local courts having had occasion since to consider the questions involved.

The supreme court of California applied the law as it was declared by them in

Richards vs. Dower, 81 Cal., 44.

It was approved by the supreme court of Arizona in

The Tombstone Townsite Cases, 15 Pac., 26,

and it was adopted by the Court of Appeals of Colorado in

Moyle vs. Bullene, 44 Pac., 69.

The leading writer on mineral lands, who has considered exhaustively the effect of the issuance of patents under the laws of the United States for portions of the

public domain, considers it as a settled proposition that a mining claim which exists within a patented townsite at the time the patent is issued,—by relation, the time of final entry—, does not pass by the patent, and that the mining claimant may defend in actions at law against the townsite title by showing the existence of such claim.

Lindley on Mines, 177.

In Davis vs. Weibold, and Richards vs. Dower, the mining location had not been made until after patent, but it was maintained that the ground embraced in the location was a "mine", within the meaning of Sec. 2392, R. S. U. S.

The court held in both instances that the ground in question was not reserved from conveyance by the patent unless it was known to be valuable for the mineral at the time of the townsite entry.

No such question arises in this case. Here the plaintiff had at and before the entry of the townsite a valid mining claim from which he was at the time of the entry actually engaged in extracting gold.

It would seem, in view of this state of the law, and particularly in view of the re-affirmation of the doctrine of Deffeback vs. Hawk in Chambers vs. Jones, after the decision by this court in Barden vs. Northern Pacific Railroad Company, that there was no course open to the

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supreme court but to reverse the judgment, yet without even a reference to the decision of the court made scarce two years before, when they said "It does not seem to us to be profitable to re-enter the discussion of the Smoke-house cases; they decide the questions of law involved in this case," the judgment is affirmed upon the opinion filed in the trial court, with the additional suggestion that the plaintiff in error has "disconnected himself from the United States," and is guilty of laches in permitting the defendant in error to remain in the possession of the premises for fifteen years or more.

It must not be forgotten that this action was brought by the defendant in error, the plaintiff below, to quiet *his* title to the premises. He is the actor, not the plaintiff in error. The plaintiff in error denied his title, though admitting that he and his predecessors obtained deeds for the premises from the probate judge under the patent of the latter, and that they occupied the premises as averred, but he avers that by reason of the existence of his mining claim at the time of the entry of the townsite, the probate judge never got any title to that part of the ground embraced within the exterior limits of the townsite, which was also included in plaintiff in error's mining claim; that the title to the part of the ground embraced within the limits of the townsite never passed from the United States, and that defendant in error, con-

sequently, could not possibly acquire title to it by operation of any state statute of limitation or adverse possession, by reason of which considerations defendant in error had no title which could be quieted.

The plaintiff in error asked some affirmative relief, that he be put into possession so that he might make proof and obtain a patent for his mining claim.

It might with some force be argued that, as to this affirmative relief, the plaintiff in error's laches and the fact that he had "disconnected himself from the United States," (as to which more will be said hereafter), bar him from from this relief; but such facts could not possibly serve to take the title out of the United States and vest it in defendant in error. *He must recover on the strength of his title, not on the weakness of the plaintiff in error's.*

On the conceded facts shown by the record we insist that the title to the premises in question is absolutely in the United States or is in the United States subject to the right of the plaintiff in error to the possession of the same, and the right in him to obtain a patent for the same. And in either case, it was error in the court to adjudge that the defendant in error is "the owner of the premises described in the complaint."

A plaintiff in a bill to quiet title must show that he has the title.

Kennedy vs. Elliott, 85 Fed., 832-835.

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So in actions, equitable in their nature under state statutes to quiet title, as in ejectment, the plaintiff must recover on the strength of his own title, not on the weakness of his adversary's.

Frost vs. Spitley, 121 U. S., 552;

Holland vs. Challen, 110 U. S., 15;

Schlosser vs. Crookshank, 65 N. W., 344;

Blodgett vs. McMurtry, 57 N. W., 985 (Neb.);

Jackson vs. LaMoure Co., 46 N. W., 449 (N. D.);

City of San Francisco vs. Ellis, 54 Cal., 72;

Hart vs. Bloomfield, 5 So., 620 (Miss.);

Ricks vs. Bastell, 8 So., 514 (Miss.);

Chiles vs. Champenois, 69 Miss., 603;

McCauley vs. Ohenstein, 62 N. W., 232;

Ordway vs. Cowles, 45 Kan., 447;

Dick vs. Foraker, 155 U. S., 404–414;

Kitts vs. Austin, 83 Cal., 167;

Henry vs. Pesoli, 109 Cal., 53;

Wood vs. M. K. & T. Ry. Co., 11 Kan. 323;

Ency. of P. & P., 300–361.

In Heney vs. Pesoli, supra, the court says,

> "We do not doubt but that in an action to quiet title the burden rests upon the plaintiff to show title in himself, and if he fails to make out a case he is not entitled to recover."

Wood vs. Railway Company, above cited, is a pertinent case. That action like this was brought under a statute to quiet the plaintiff's title. He had settled upon lands with a view to acquire title under the pre-emption law. The title to the land in question was not subject to acquisition under the pre-emption law. It was held that he could not maintain an action to quiet title, having no title to quiet.

After reaching the conclusion that the plaintiff could not acquire title to the lands in question under the law upon which he founded his right to them, the court continued:

> "He is therefore, as we have before said, merely a trespasser upon government land. Can such a person maintain an action to quiet his possession against some person who has no interest in the land, but claims that he has? We think not. * * * 'The plaintiff must show some right in himself, and some injury to that right by another, before he can subject him to the costs and vexations of a law suit.' (5 Kas., 27.) And this is good law, and applicable to this case. It has never yet been decided by this court that a mere trespasser without color of right or title can maintain an action to quiet title or possession. Possibly however such a person may in some cases maintain such an action. A mere tres-

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passer without color of right or title, who has been in the actual possession of real estate for fifteen years, claiming title thereto, becomes the owner of the property by virtue of the statute of limitations, if the property has been owned during all that time by some individual or individuals, *and not by the United States.* (Gen. Stat., 633, code, §16, subdiv. 4.) Mere possession therefore of lands to which the government has parted with its title, for any period, however short, with a claim of ownership, may be said to be an incipient or inchoate title, for such a possession will in time ripen into a complete, perfect and absolute title. And it may be that a person with such a possession may maintain an action to quiet his possesion, or for injuries thereto against any person who has not a paramount right, and who may claim adversely to him, or who may disturb his possession. But this can never be so where the government owns the real estate in controversy. The statute of limitation never runs against the government. (Lindsey vs. Miller, 6 Peters, 666; Gibson vs. Choteau, 13 Wall., 92, 99.) Therefore no trespasser can ever obtain any rights upon government land. And no decision of any state court under the laws of the state can ever possibly give him any such rights. He may occupy the land a hundred years, and have a hundred decisions in his favor, and still the right of the government will be as absolute as ever. He may quiet his title and possession against every person in the known world, and still he has obtained nothing. The government may still sell to any one of these persons as freely as to him, and any one of them has the same right to purchase from the government that he has. And no length of time in which he may be in possession of the land will shorten the time in which the government has the right to assert its title or claims thereto, or in

which it may sell to others, or in which these others may purchase from the government. A decision therefore quieting title to government land, being absolutely nugatory, it can hardly be supposed that our law-makers ever intended that such a decision should ever be made. But even if they should so intend, and pass a statute accordingly, the statute would be void. It is not necessary to examine to see whether the defendants own the land in controversy or not."

If the view of the supreme court of Montana expressed in its opinion in this case is correct, that the plaintiff in error has lost his rights in the premises in question by laches or otherwise, then the title is unquestionably in the United States, as such title, on the admitted facts, never passed from it.

It has been held that one in possession of a part of the public domain will be held to be the true owner as against a mere trespasser. But so is the occupant of any real estate.

The doctrine that the occupant of public land is presumed to be the owner as against a trespasser was never carried to the extreme, even before the passage of the statute of 1885 making it unlawful to enclose the public domain, referred to in Kitts vs. Austin, supra, of holding that one in possession of a portion of the public domain, himself having made no effort to obtain title to it under any law of the United States permitting him to do so, can maintain an action to quiet his title, as against one who seeks to acquire title from the government pursuant

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to its laws for the disposition of lands of the character of those in controversy.

Indeed the very contrary of this has been expressly adjudicated.

Brandt vs. Wheaton, 52 Cal., 430.

It must not be overlooked that it is expressly averred in the answer that the plaintiff in error entered upon the premises and has occupied them without any intent or attempt to acquire title to them under any laws of the United States pursuant to which they might be entered,

Transcript, Page 13,

relying, evidently, on his claim of title deraigned through the probate judge.

Without such intention, particularly in view of the act of 1885, before referred to, his occupancy and possession clearly gave him no rights whatever.

Buxton vs. Traver, 130 U. S., 232;

Northern Pacific Ry. Co. vs. McCormick, 89 Fed., 659.

———o———

It need not be added that if the probate judge got no title to the ground embraced in the mining claim of plaintiff in error at the time he made his entry, he acquired none by any subsequent abandonment or forfeit-

ure of such mining claim. His grant was fixed at the time it was made—the date of entry—and by the conditions then existing. If a "mine" had existed before the entry but had been worked out, or a mining claim had been staked and theretofore were abandoned or forfeited, the grant to the probate judge would include it.

Richards vs. Dower, 81 Cal., 44.

On the contrary if the "mine" or the mining claim existed at the time of the entry, the subsequent exhaustion of the one or the failure of the other would not operate to extend the grant to the probate judge over it.

Hermocilla vs. Hubbell, 89 Cal., 5;

Barden vs. Northern Pacific Ry. Co., 145 U. S., 535.

———o———

The case has been thus far argued upon the assumption that the plaintiff in error had "disconnected himself from the United States government" and "stands in no privity with it." But there is no valid ground for holding that he has lost all his rights in the mining claim which he was working at the time the townsite was entered.

The defendant in error dates his rights from the year 1874.

The Act of Congress of May 10, 1872, provided as follows:

> " On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the *first day of January eighteen hundred and seventy-five*, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location."
>
> R. S. U. S. 2324.

Under the plain provisions of this statute, the owner of a mining claim who has failed to "represent" it, may, at any time before it shall have been re-located, return and resume work upon it, and be restored to all the rights in it which he originally possessed.

Morrison's Mining Rights, 67;

Lindley on Mines, 643;

Lakin vs. Sierra Buttes Co., 25 Fed., 337–343.

Forfeiture is not complete until some one else enters with intent to re-locate the property.

But the interest of the plaintiff in error could not be forfeited for failure to do the annual representation work while some one else was in possession of the property, and he was kept out. Such conditions are held to excuse the failure to do representation.

Utah M. & M. Co. vs. Dickert, 21 Pac., 1002;

Slavonian vs. Peraisch, 1 Mor. Min. Rep., 541;

Mills vs. Fletcher, 100 Cal., 142.

This is a matter of no importance, however, as no relocation has been made or attempted to be made.

Clearly the plaintiff in error has not "disconnected himself from the United States" by a forfeiture of his claim by failure to do the representation work.

But it is claimed that one may lose possessory rights in the public domain by abandonment as well as by forfeiture.

That a mere possessory right, or such a right as springs from mere possession of a portion of the public domain, may be lost by abandonment, there can be no doubt. The laws of the United States contemplate the acquisition of title to a mining claim without the claimant's having done any one or more of the acts necessary to make a "location."

Sec. 2332, R. S. U. S., provides as follows:

> "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter in the absence of any adverse claim."

A right initiate under this statute is of a nature so frail that any person making a location of ground embracing such a claim would hold it rather than he who took no steps to "locate."

So prior to the Act of 1872, or at least prior to the Act of 1866, the mining claimant's right originated solely in, if it did not rest wholly upon possesssion.

That such a right may be lost by abandonment is indisputable. But that a mining claim, validly located, importing a grant from the government, though on a condition subsequent, is lost by leaving it without the intention to return (for that is what abandonment means), is at least doubtful. One might leave his mining claim with a fixed determination not to return to it, nor to do any more work on it, and yet change his mind before the expiration of the year, or before any one else had re-located. It is said that abandonment operates instanter. If so, his right was lost when he left, he could not oust an intruder and he must relocate the ground, if vacant, or he will lose his rights should any one locate over him.

We do not think this is the law. It is inconsistent with the idea that the effect of abandonment is avoided if the claimant returns before any adverse right is initiated, and that thereupon his rights relate back to his original location and do not date only from the time of his reentry.

Tucker vs. Jones, 8 Mont., 225.

But these considerations are of no moment upon this record. Abandonment is not in the case. It is a question of intention and of act.

Two elements must exist to constitute an abandonment; the claimant must quit the premises, and he must leave with the intention not to return or make further claim on them. The important element is, manifestly, the intention with which he leaves.

In this instance not only does it not appear that the plaintiff in error left his claim with the intention not to make any further claim to it, but it is affirmatively alleged that he left it in the charge of an agent and that in his absence the defendant in error and others intruded upon his claim and have since continued to occupy it.

It has been expressly adjudicated that

> "lapse of time does not of itself constitute an abandonment, but that it is only a circumstance for the jury to consider in determining the question whether there was abandonment; or in other words, the question is one of intent."

Moon vs. Rollins, 36 Cal., 333.

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The opinion in this case is by Judge Sawyer and in it is quoted the language of Judge Field in Keane vs. Cannovan, 21 Cal., 293, as follows:

> "There are cases, undoubtedly, in which an abandonment may be inferred from the lapse of time, and the delay of the first occupant in asserting his claim to the possession against parties subsequently entering upon the premises. But in such cases the leaving the premises must have been voluntary, and *without any expressed intention to resume the possession.* In the case at bar, it appears that when Mondolet ceased to occuy in person the premises he left an agent in charge of them. *This circumstance is of itself sufficient to rebut the presumption of abandonment arising from the fact that he ceased to occupy them, and to render the question, whether in fact he did or did not abandon them, one for the consideration of the jury.*"

In the case of Moon vs. Rollins, it was further held that absence for a time longer than the period of the statute of limitations, even, did not of itself constitute abandonment, as to which the court says:

> "But if a party may return in five years, it is not apparent why he may not return in five years and one month or two months, unless an adverse possession has barred the right of entry. It is a question of *intention*, and has been so held over and over again, and *not* a question of *time*, except so far as the jury are entitled to consider lapse of time in connection with other circumstances of claim, or non-claim, and acts of ownership and dominion, or a want of such acts, for the purpose of ascertaining the intention."

To the same effect is

Beaver Brook Co. vs. St. Vrain Co., 6 Col. App., 130.

The supreme court of Montana has itself declared that abandonment is a question of intention and that mere lapse of time is not alone sufficient to establish abandonment.

Gassert vs. Noyes, 18 Mont., 216.

Except the pleadings admit that the party left without the intention to return, the question of a bandonment must be submitted to the jury for trial.

Hewitt vs. Story, 64 Fed., 510–533;
(Circuit Court of Appeals, 9th Circuit;)

Valcalda vs. Silver Peak Mines, 86 Fed., 90;
(Same court.)

Lindley on Mines, 643.

Accordingly there is no opportunity to say that the plaintiff in error has "disconnected himself from the United States." Certainly not by forfeiture, because there has been no relocation; and not by abandonment, because it not only does not appear that he left without intending to make further claim to the ground, but it affirmatively appears that his intention was to hold it.

But, as before stated, it is altogether immaterial whether the plaintiff in error has any longer any rights in the premises or not. If he has not, the ground belongs absolutely to the United States, and the decree is erroneous in adjudging that the defendant in error is the "owner of the premises described in his complaint and involved in this controversy."

———o———

As to the affirmative relief asked, it is respectfully contended that the law gives the plaintiff in error the right to re-enter the premises, to prosecute mining work upon them, and to obtain patent for his claim. If the contention is sound that the United States never passed the title to the ground embraced in this mining claim to the probate judge, it is subject to entry, and the defendant in error ought not to be allowed indefinitely to occupy the premises without any attempt to acquire the title from the government, and to prevent, for all time, anyone else from doing so. If this doctrine is sound, any portion of the public domain may be appropriated by any person who occupies it adversely as against citizens qualified to obtain title to it under the laws for the disposition of the public domain.

It cannot for a moment be doubted that though one should take possession of the claim of a homesteader and occupy it for the period of the local statute of limitations,

he would acquire no right as against the former unless he had proceeded conformably to the laws of the United States, by proper contest before the land office to forfeit the original claimant's right and to file on it himself, if he were qualified to do so.

The doctrine that the original claimant may return and repossess himself of public land which he formerly occupied under the laws for the disposition of the public domain, unless meanwhile some other person has initiated an adverse claim to the same land under those laws, is a general principle, recognized and applied in reference to all classes of lands by the courts and the land department.

It might be thought that the action of the plaintiff in error in applying for and obtaining a deed from the probate judge for Lot 31 on his return, finding the defendant in error in possession, was estopped to question the transfer of the title by his patent to the probate judge. But this feature of the case was likewise determined in the Smokehouse cases.

In *Talbott vs. King*, 6 Mont., 76,

the townsite claimants offered

> "to prove that the former owners of the Smokehouse claim, and while so owners thereof, and knowing that said claim would be within the boundaries of the proposed townsite of Butte, joined others in petitioning the probate judge to enter said townsite for a patent, and in accordance therewith the townsite

was patented, and the owners of the Smokehouse claim accepted from the probate judge deeds to lots on said claim; and that these owners declared that they would not interpose or assert their title to this mining claim or any rights thereunder, as against the townsite patent, or those claiming under the same."

This offer was rejected, and in affirming the action of the lower court the supreme court of Montana said:

"No one could have been deceived by the act of the owners of the Smokehouse claim in signing a petition for, or taking an active part in procuring the townsite patent. And if such owners accepted deeds from the probate judge for lots included within the Smokehouse location, they received deeds for land that they already had a title to, and no one was deceived or injured thereby. And if they declared that they would make no claim by virtue of their Smokehouse location, still the location remained a valid mining claim, to which the appellants and no one else could acquire any title by virtue of the townsite patent. Their declaration did not repeal the act of congress, which declares that no townsite patent shall convey any interest in or to any mine, mining claim, or possession. It did not change a valid mining claim into a townsite. It did not authorize to be done what the government under the law could not do; and it does not appear that the appellants were, in any manner, induced to act upon such declarations to their injury or otherwise. It does not appear that one solitary act has been performed by any one in consequence of these declarations, nor that they were made with the intent that any one should act upon them."

It seems probable that the apparent inequity of the case of the plaintiff in error and the disposition not to disturb titles long considered settled, constrained the supreme court of Montana to overlook the principles of the law applicable to townsites on the public domain which its own decisions contributed so largely to establish, in reaching the conclusion it did in this case. The judgment should be reversed and the cause remanded with directions to proceed to trial on the answer interposed by the plaintiff in error.

Respectfully submitted,

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